

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1325

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1325

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
DAVID BELL,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

THE HONORABLE LEE P. GAGLIARDI, DIST. CT JUDGE

APPENDIX

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ON THE BRIEF: RONALD A. MOLTER (P 25463)

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Perhaps the jury shares my question. There will be one further government witness who I told to be here at 1 o'clock, anticipating that we would go until that time. He is probably in the street at this moment, and I don't anticipate I can get in touch with him. He will be our last witness. So we have Detective Guzman, and the chemist and this other witness.

THE COURT: See what you can do in the next ten minutes to get him here. Incidentally, the government has submitted a memorandum to me with respect to the testimony of, if there is testimony, from Mr. Lester Bell as to his sentence, etc.

MR. BELL: I would object, your Honor, to the sentence but not the conviction.

THE COURT: If you want to submit any authorities you can give me citations. They have given me one and if you have any, give me a citation.

MR. BELL: I am relying on 609(a) which does not deal with sentence, but conviction.

THE COURT: If you have any cases give them to me.

(Recess)

MS. NEUGARTEN: 3500 material is as follows:

3501, DEA-6, purchase of Exhibit 3. 3502, DEA-6, surveillance of Exhibit 3. 3503, DEA-6, acquisition of Exhibit 4. 3504, DEA-6, surveillance of Exhibit 4. 3505, DEA-6, arrest of

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2 believe that I should exclude it. I will give you my
3 answer, however, in looking up the cases. I think the case
4 you cited to me, and I don't have the memorandum here, was a
5 non-jury case before Judge Bryan, and the statement in
6 there was to the effect that it might go to the gravity of
7 the offense rather than the purpose for which you want to
8 introduce it, as merely that he's got nothing to lose by
9 committing an additional crime of perjury, which is an argu-
10 ment.

11 MS. NEUGARTEN: Your Honor, there is another
12 authority I wish to bring to your attention and to defense
13 counsel's attention. In a trial tried by Judge Frankel in
14 November and December of this year, United States v. Martin
15 DiSeverio et al, one of the defendants was one Albert
16 Victory who sought a ruling before deciding whether to take
17 the stand as to whether he could be examined as to a sentence
18 he was serving for felony murder in the State of New York,
19 and that was a 25 to life sentence. Judge Frankel ruled he
20 could be examined on the sentence although not as to the crime
21 for which he was serving, given that it was a murder charge.
22 For that reason then the defendant did not take the stand.

23 THE COURT: I think that if you were going to
24 ask the question you would ask him for his convictions, to
25 which Mr. Bell has raised no objections being admissible,

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2 merely what the length of time he is serving as a result of
3 his convictions. I would think if I am going to permit it,
4 that the question be phrased in that way. I haven't
5 definitively decided, I am leaning towards admitting it.
6 I believe that it is relevant under 401, and that it is
7 admissible under 402 and that 403 does not indicate that it
8 should be excluded on the ground of unfair prejudice,
9 confusion of the issues or misleading the jury, because I
10 don't think so. It really goes to the issues that you want
11 to present it for and I am inclined to do it. But we are
12 researching it further to see if there is anything else
13 that we can come up with. I will let you know before Mr.
14 Bell takes the stand whether you are going to be able to
15 examine on that. But, as I say, my present inclination is
16 yes.

17 Anything else? Then maybe we will sum up this
18 afternoon and charge the jury in the morning. My procedure
19 usually is where there is only one defendant and it is a
20 simple case is to let the government sum up first, as we are
21 required to do, and cover everything and the defendant sum up
22 last and not allow a rebuttal unless I should see that there
23 is something brought up in summation by defense counsel that
24 calls for it. But I think in a one-defendant case, a simple
25 one like this, there is no need for two summations by the

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Harrington-direct

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2 out. You have a motion to make at the conclusion of the
3 government's case. I don't think I need any argument on it.
4 We can deem your motion to be made, or you can reserve it
5 until the finish of the case, but on the basis of the
6 testimony with respect --

7 MR. BELL: I can do it at the side bar, your Honor.

8 THE COURT: All right. How can we arrange to
9 get Lester Bell down here, Mr. Batchelder?

10 MS. NEUGARTEN: We just have to call the third
11 floor and he will come down.

12 THE COURT: Let's call them and bring him down.
13 If we get the jury in, they can put him right in the jury
14 room, so he is not standing out there in handcuffs.

15 (Pause)

16 THE COURT: I will permit the question that I
17 indicated about the sentence that Lester Bell is serving.
18 You may ask him what sentence is he serving as a result of
19 his convictions.

20 MS. NEUGARTEN: If we are discussing that issue
21 at this point, may I ask you another question?

22 THE COURT: Yes.

23 MS. NEUGARTEN: I'm not sure I understood whether
24 I was going to be permitted to inquire as to the prior crime,
25 the nature of the crime, or only as to the sentence.

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Harrington-direct-cross 91

2 THE COURT: No, you may inquire as to what he's
3 been convicted for and what he's plead guilty to, and you
4 may ask him as a result of all of these what sentence he is
5 serving.

6 MS. NEUGARTEN: We brought the two other convic-
7 tions to your Honor's attention in the memorandum.

8 THE COURT: They are all within the past ten
9 years. There is one you had some doubt about?

10 MS. NEUGARTEN: It was 1974. And of course the
11 plea of guilty before your Honor was only this past June.

12 THE COURT: You can bring them all out.

13 Bring the jury in please.

14 (Jury present.)

15 THE COURT: You may proceed, Ms. Neugarten.

16 MS. NEUGARTEN: I have no further questions of
17 this witness.

18 THE COURT: Cross examination?

19 CROSS EXAMINATION

20 BY MR. BELL:

21 Q Officer Harrington, as I understand it, sir, you
22 were present at the time a certain statement was made, you
23 say, by this defendant to an Assistant United States Attorney,
24 is that correct?

25 A Yes, sir.

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1 elrm

L. Bell-cross

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2 indictment?

3 A They had three indictments against me. I pleaded
4 guilty to one count of one charge to have them drop the other
5 counts.

6 Q Before what judge did you plead guilty?

7 A Before the Honorable Judge Gagliardi.

8 Q There was a time when you were sentenced on that
9 indictment, wasn't there?

10 A Yes.

11 Q At that time you had already been sentenced in
12 the State Court, hadn't you?

13 A Yes, I had.

14 Q And you had been sentenced to 15 to life in the
15 State Court?

16 A Yes, I had.

17 Q When you were sentenced here what did you get?

18 A 5 years, plus 10 years conditional parole.

19 Q Was that 5 years to run concurrent with the state
20 time?

21 A Yes, it was.

22 Q So you didn't get any extra time for the federal
23 crime you committed, is that right?

24 A It is all according to the way you look at it. I
25 wasn't guilty of the state crime, so that means I am still

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1 elrm

L. Bell-direct

2 A I have a federal conviction for federal conspiracy
3 to sell narcotics, which I received a sentence of 5 to 10
4 years. 5 years sentence, 10 years conditional parole.

5 Q Would that case have been in this court?

6 A Yes, it was.

7 Q Would it have been related to this present case
8 before this Court?

9 A Yes, it was. Part of the same indictment.

10 Q Do you have any other convictions?

11 A No felony convictions except probation case for
12 possession of a weapon.

13 Q When was that, sir?

14 A This was in 1974.

15 Q Mr. Lester Bell, would the fact, sir, that you
16 are a convicted felon in any way prompt you to tell an untruth
17 before this jury and in court?

18 A There is nothing that I can think of would cause
19 me to tell an untruth. Not knowing.

20 Q Do you know a man called Billy Vernon?

21 A Yes, sir, I do.

22 Q Did you know Billy Vernon on or about the 3rd of
23 October, 1974?

24 A Yes, I did.

25 Q Did you have an arrangement with Billy Vernon to

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L. Bell-direct

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2 sell some cocaine to a man later determined to be an under-
3 cover police officer?

4 A Yes, I did.

5 Q Do you recall what that man's name was?

6 A No, I don't recall his name.

7 Q Do you recall where the transaction, the sale
8 took place?

9 A I remember where the sale took place and where I
10 met him.

11 Q I'm sorry, I didn't hear you.

12 A I said I remember where the transaction took place
13 and where I first -- where we first met -- where I first met
14 Billy Vernon.

15 Q With regard to the October 3, 1974 sale, would
16 you tell the Court and the jury what happened at that
17 transaction?

18 A Well, I was coming across the street, I was down-
19 stairs coming across the street. I met Billy Vernon on the
20 sidewalk. Billy Vernon told me that he had something, one of
21 his relatives wish to purchase some cocaine. And I obtained
22 the cocaine --

23 Q Did you personally make the arrangements?

24 A Yes, I did. I obtained the cocaine and took it
25 back over to his apartment.

1 way that they were sitting and I noticed the way they were
2 set up, the undercover agent sitting down in the chair, the
3 other guy standing up behind him in the chair. I knew that
4 there was something wrong.
5

6 Q Did you at some point in time transfer the
7 cocaine to the undercover agent?

8 A Yes. After I had made certain that Billy Vernon
9 and the undercover agent had sniffed the cocaine, I made the
10 transaction and sold them the cocaine.

11 Q How much money did the undercover agent give you?

12 A It was a half an eighth. He gave me \$1600, I
13 think it was, because I gave Billy Vernon some for setting
14 up the transaction.

15 Q Did David Bell participate in that transaction at
16 all?

17 A No, he didn't.

18 Q Did there come a time, sir, when there was a
19 complaint made about the quantity of cocaine that you had sold
20 to the agent?

21 A Yes. It was one night down in Sweeties, the Sweet
22 Shop, the restaurant there, it was the Sweet Shop, the Soul
23 Expression, and he complained, he said the quantity of it was
24 short and that the quality of it was bad. So I agreed with
25 him to give him one-quarter to make up for the quantity and

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2 set up, the undercover agent sitting down in the chair, the
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25 him to give him one-quarter to make up for the quantity and

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L. Bell-direct

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2 the quality of it.

3 Q Do you recall, sir, when it was that this
4 transaction took place?

5 A Approximately six, seven -- it was a week, some-
6 thing like a week afterward.

7 Q Who gave the agent the additional, I think you
8 call it quarter?

9 A I gave it to him myself.

10 Q You gave it to him?

11 A Yes, I did.

12 Q Did David Bell participate in that at all, sir?

13 A No, he didn't.

14 Q Is this the first time you have told this story?

15 A No, it is not.

16 Q Who also have you indicated those facts to?

17 A The undercover agent and the U.S. Attorney.

18 Q You told them that?

19 A Yes.

20 Q Did they record what you said at that time?

21 A I'm not sure whether they did or not. They
22 wasn't interested in that.

23 MR. BELL: You may examine.

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1 elrm

Harrington-direct

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3 government's case. I don't think I need any argument on it.
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Harrington-direct-cross 91

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24 is that correct?

25 A Yes, sir.

1 elrm

L. Bell-cross

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2 going to get time which I shouldn't be getting.

3 Q You are aware that if you tell a false statement
4 when you are under --

5 MR. BELL: Objection, your Honor. There is no
6 call for that.

7 THE COURT: I will permit it. Overruled.

8 Q You are aware that if you tell a false statement
9 when you are under oath on the stand in this court, you
10 commit a crime called perjury, is that correct, if you do
11 that behavior?

12 A If I don't tell the truth I commit a crime such
13 as perjury.

14 Q And you are aware there is a penalty for perjury,
15 is that correct?

16 A I realize this.

17 Q You realize that the penalty is 5 years?

18 A I realize that.

19 Q So you realize that you are serving more time
20 already than you could get if you are convicted for perjury?

21 A I am serving more time --

22 MR. BELL: Excuse me, your Honor. Don't answer
23 that. Objection, your Honor.

24 THE COURT: Yes, sustained.

25 Q I believe you testified that David Bell was in

1 elrm

2 two ounce transaction. He didn't deny this transaction. All
3 he said was, I have been doing so much of it I don't know
4 whether I did this transaction or I didn't do this trans-
5 action. Isn't that strong evidence in itself?

6 What do we hear from the other side? We hear
7 the unimpeachable testimony of Lester Bell. What do you know
8 about that testimony of Lester Bell? You know tha he is a
9 man who is serving 15 to life in the state courts. You know
10 he is the brother of the defendant on trial. You know that
11 when he got convicted of the federal offense and was
12 sentenced after the state court, he didn't get any additional
13 time. And most of all, you know that even after he said he
14 knew about perjufy, he knows he is not supposed to lie under
15 oath, he tells you that he picked the cocaine up off the
16 sidewalk.

17 Now, use your common sense. You know a little
18 bit about the world. You know a lot about the world. Do you
19 believe that testimony? And if you don't believe that
20 testimony, do you believe anything that Lester Bell told you?
21 Hasn't he every incentive in the world to take the weight,
22 to protect his brother? What does he have to lose? He is
23 already serving 15 to life in the state. What does his
24 brother have to lose if his brother is convicted?

25 And think about another thing too: Lester Bell,